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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, contrary to at least four other circuits, that a higher degree of state involvement with a private entity must be shown to establish state action for First Amendment claims than for sex and race discrimination claims.

2. Whether the court of appeals erred in holding that Amtrak's asserted policy barring the display of political advertising messages in Pennsylvania Station, New York, was not state action, where:

a) the United States created Amtrak, endowed it with governmental powers, owns all its voting stock, and appoints all the members of its Board;

b) the United States-appointed Board approved the advertising policy challenged here;

c) the United States keeps Amtrak afloat every year by subsidizing its losses; and

d) Pennsylvania Station was purchased for Amtrak by the United States and is shared with several other governmental entities.

PARTIES TO THE PROCEEDINGS

Petitioner Michael A. Lebron was plaintiff-counter-defendant-appellee below. Respondent the National Railroad Passenger Corporation (Amtrak) was defendant-appellant below. Transportation Displays, Incorporated, a defendant in the proceedings before the district court, appears on the caption of the proceedings below as defendant-counter-claimant but did not participate in the proceedings before the court of appeals.

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THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Michael A. Lebron respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 12 F.3d 388. The opinion of the district court (*id.* 1b-22b) is reported at 811 F. Supp. 993.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1993 (App., *infra*, 1c-2c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In 1992, petitioner Michael A. Lebron contracted with respondent The National Railroad Passenger Corporation ("Amtrak"), the owner of Pennsylvania Station ("Penn Station"), to display an advertisement during January and February 1993 in a large advertising space at Penn Station known as the Spectacular (App., *infra*, 2a, 2b). The work, a photomontage with text, executed in the style of an advertisement, makes the point that the profits generated by the Coors Brewing Company support various conservative causes (*id.* at 4a-5a). During negotiations for the advertising space, Lebron had disclosed that his work was political, and was not told this would pose a problem (*id.* at 3a-4a). Three days before the beginning of the contract period, however, Amtrak informed Lebron that it would not display his work because it violated Amtrak's policy against displaying "political" advertisements (*id.* at 5a; 4b). At the time, Amtrak was displaying other political advertisements in Penn Station (*id.* at 19b-20b).

Petitioner sued Amtrak and its agent, Transportation Displays, Incorporated ("TDI"), contending that Amtrak's policy and action violated the First Amendment (*id.* at, 1b-2b). The district court, per then-District Judge Pierre N. Leval, concluded that Amtrak was a state actor and that Amtrak's advertising policy violated the Constitution (*id.* at 21b). A divided court of appeals reversed, ruling that Amtrak is not a state actor subject to the First Amendment (*id.* at 12a). Chief Judge Jon O. Newman dissented (*id.* at 13a).

A. Amtrak

The facts found by the district court relating to the state action question presented to this Court were explicitly accepted by the court of appeals (*id.* 9a, 13a). Those facts establish that the United States created Amtrak, owns all of its voting stock, wholly controls membership of its Board of

Directors, endows it with governmental powers, bankrolls it, and purchased and holds the mortgage on nearly all its property, including Penn Station.

Congress created Amtrak in 1970 with a $40 million direct federal grant and $300 million in federal loan guarantees (SE2398-99; 45 U.S.C. § 501 *et seq.*)[1] and defined it as a "mixed-ownership government corporation" (31 U.S.C. § 9101(2)(A); SE2405) (App., *infra*, 7b). Although Congress stated that Amtrak is "not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government" (45 U.S.C. § 541), Congress has made Amtrak subject to the Freedom of Information Act (45 U.S.C. § 546(g); 49 C.F.R. § 7.01 *et seq.*) and defined it as a "public entity" in the Americans with Disabilities Act (42 U.S.C. § 12131(1)). App., *infra*, 6b-7b & n.3.

The United States owns all of Amtrak's preferred and only voting stock (App., *infra*, 7b; SE2402; E426 at Note 3; E1305). The common stock, which is non-voting, is owned by private railroad companies (App., *infra*, 7b).

All of Amtrak's directors are appointed directly or indirectly by the President of the United States (45 U.S.C. § 543(a); App., *infra*, 7b). The President directly appoints five of the Board's nine members (45 U.S.C. § 543(a)(1)(C) and (D)(ii)). The Secretary of Transportation sits *ex officio* (45 U.S.C. § 543(a)(1)(A)). The United States Government, as the owner of all of Amtrak's preferred stock, selects two members (45 U.S.C. § 543(a)(1)(E)). The final Board member is Amtrak's president, who is selected by the other Board members (45 U.S.C. § 543(a)(1)(B) and (d)).

"Amtrak has also been vested with various attributes of governmental character" (App., *infra*, 8b). It has the right of

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[1] "App." refers to the appendix to the petition. "C.A. App.," "E," and "SE" refer respectively to the following documents in the court of appeals: the appendix, the exhibit volumes, and the supplemental exhibit volume.

eminent domain (45 U.S.C. § 545(d)); it is exempt from all state and local taxes, including the annual New York real estate tax on Penn Station of nearly $18 million (45 U.S.C. §§ 546(n), 546b; E353-91); and it may borrow under the credit of the federal government (45 U.S.C. § 602). App., *infra*, 8b-9b. In addition, it must report annually to Congress (45 U.S.C. § 548; App., *infra*, 9b), and its financial transactions are audited by the Inspector General and may be audited by the Comptroller General (31 U.S.C. §§ 9105-9106; App., *infra*, 8b n.5; SE2405).

The federal government is deeply involved in the financing of Amtrak's operations and the acquisition and maintenance of its assets (App., *infra*, 7b). Amtrak has never made a profit and would not exist but for massive annual subsidies from Congress (*id.* at 7b-8b; SE2413, SE2416; C.A. App. 417-20, 424). In every one of its 24 years of existence, Amtrak has depended on substantial federal subsidies to cover its losses (C.A. App. 417-20, 425). In the past five years alone, Congress has appropriated $3.312 billion to subsidize Amtrak's operating losses (45 U.S.C. § 601; SE2414; App., *infra*, 7b-8b).

Because of Amtrak's dependence on federal subsidies, a dollar of revenue earned by Amtrak is a dollar saved by the United States (App., *infra*, 8b). "For this reason, Amtrak's revenues from the leasing of its billboard space are, in a sense, revenue of the federal government" (*id.*). In recognition of this fiscal relation, Congress has instructed Amtrak to use its "best business judgment in taking actions to minimize Federal subsidies" and specifically encouraged Amtrak to enter into profit-generating contracts with the private sector in order to reduce the level of federal subsidies (45 U.S.C. § 501a(1), (14); App., *infra*, 8b n.5).

Amtrak's principal properties, including Penn Station itself, were purchased by the United States, are mortgaged to the United States, and remain under the control of Amtrak's gov-

ernment-appointed Board. Amtrak did not own any track or stations or directly operate trains until 1976 when it received the Northeast Corridor properties pursuant to congressional plan. SE2407; E453-54; E958-66. The United States "paid Penn Central $2.113 billion for the Northeast Corridor properties, including Penn Station," the largest settlement payment in United States history (App., *infra*, 9b n.7; SE2411-12 (and authority cited there)).

The federal government holds a mortgage valued at "hundreds of millions of dollars" on the Northeast Corridor properties, which secures a note that does not mature for nearly 1000 years (the year 2975) (SE2419; App., *infra*, 9b; C.A. App. 439; E425; E472). Since Amtrak acquired the Northeast Corridor, the federal government has invested billions of dollars in its maintenance, rehabilitation and development (*see* 45 U.S.C. § 854; App., *infra*, 9b). Amtrak's properties cannot be sold or leased above certain dollar amounts without approval of the Board (C.A. App. 345).

Penn Station, one of the busiest hubs in New York City, serves as a station not only for Amtrak but also for New Jersey Transit ("NJT") and the Long Island Railroad ("LIRR"), both public authorities (App., *infra*, 8b n.8). The New York subway system, operated by the New York City Transit Authority ("NYCTA"), another public authority, abuts the station at both ends (SE2365; C.A. App. 338-39; N.Y. Pub. Auth. Law § 1263 (McKinney 1982 & Supp. 1993)).

"An array of leases and joint agreements among Amtrak, LIRR, and NJT govern the management of the public areas of Penn Station, the passage of passengers through the station and from one transportation facility to another, and the funding of construction and maintenance of various train and tunnel facilities" (App., *infra*, 9b n.8). Some LIRR and NJT facilities, such as ticket and information booths, are in the midst of Amtrak's facilities on the same floor as the Spectacular (*id.*). An NYCTA official also shares space in

Amtrak's information booth (C.A. App. 671-72), and easements with NYCTA permit subway passengers to use Penn Station as a transfer point (*id.* at 338-39). Although constitutional restrictions apply to all those public authorities, the public has no way of knowing whether it is in an area governed by Amtrak or one of the other governmental transportation authorities (App., *infra*, 9b n.8).

Amtrak's Board has direct authority over Amtrak's advertising leasing policy and has delegated authority to implement that policy, subject to Board review, to Anthony DeAngelo, the Amtrak Vice President for Real Estate and Operations Development (App., *infra*, 4b, 13b & n.10; SE2382; C.A. App. 343-45, 355-56, 739-40). Amtrak's Board has consistently and closely supervised the arrangements by which advertising space is leased in Penn Station (E2-E59, E188-E201, E296-E303, E320-21, E323-36, E343, E392-E402, E444-47, E1918-21). According to DeAngelo, the policy challenged here preceded his arrival at Amtrak in 1982 (C.A. App. 334, 354, 366), was expressly reflected in leasing contracts formally approved by Amtrak's Board (*id.* at 345, 350; E31, E42, E188, E192; App., *infra*, 13b & n.10), and was consistently observed in the ten years that DeAngelo headed the Real Estate Department (C.A. App. 107). Because petitioner's two-month contract (E2219-20) fell within the range set by the Board for DeAngelo's financial signing authority, the Board authorized DeAngelo to apply its policy to Lebron's contract (App., *infra*,13b; E1039-45).

B. Proceedings Below

1. After an expedited trial based on written submissions largely stipulated by Amtrak (App., *infra*, 2b; SE2363-2435), District Judge Leval made extensive findings, detailed above, regarding Amtrak's dependence upon and control by the United States. Carefully considering all these facts, he concluded that the "federal government's deep and controlling entwinement in Amtrak's structure and operations" justified

treating Amtrak's policy regarding speech access to Penn Station billboards as state action (*id.* at 6b).

In reaching this result, Judge Leval rejected respondent's reliance on a number of cases that had held that Amtrak (or the Consolidated Rail Corporation) is not a state actor for routine employee decisions (App., *infra*, 10b-11b). Noting that "[w]hether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue" (*id.* at 11b), the district court held that permitting Amtrak to deal with routine employee matters under the same rules that govern private employers did not implicate the same profound constitutional consequences as would permitting Amtrak, with its vast network of governmental involvement and properties, to allocate access to government-purchased properties to speakers on political grounds (*id.* at 11b-12b). Imbued with the powers of a private actor, Amtrak would be "free to exercise discriminatory control over the messages transmitted by its billboards" (*id.* at 12b) and, in regulating billboard advertising based on its content, Amtrak could " 'effectively drive certain ideas or viewpoints from the marketplace' " (*id.* at 13 (quoting *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991))).

The district court concluded that it was "inconceivable" that Amtrak should have such freedom to control ideas when "[its] directors are appointed by the President, [its] operations are financed by the Government, and [it] is subject to Governmental control and intertwinement in all the respects outlined above" (App., *infra*, 13b). As a consequence, Amtrak "must be deemed to engage in governmental action when it undertakes to regulate the content of the advertisements on its billboards" (*id.* at 14b).

The district court then held that Amtrak's policy for regulating advertising on its billboards violates the First Amendment because (1) it is not clearly set forth; (2) its vagueness permits abuse; (3) it is not consistently applied; and (4) it may

discriminate on the basis of viewpoint (*id.* at 14b-21b). Accordingly, the district court directed Amtrak to give petitioner "immediate access to the Spectacular in accordance with his contract" (*id.* at 22b). That order was later stayed by a panel of the court of appeals.

2. A divided court of appeals reversed, holding that "Amtrak is not a governmental actor subject to the strictures of the First Amendment" (App., *infra*, 3a). The panel majority did not "take issue" with the district court's detailed findings regarding the interrelationship between Amtrak and the federal government, but "rather with the legal conclusion that is derived from it" (App., *infra*, 9a).

The panel relied on two factors in concluding that Amtrak was not a state actor for purposes of regulating speech access to Penn Station. It held that Lebron had to meet a heightened showing of state involvement to demonstrate state action, because "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation" (App., *infra*, 10a-11a).

Second, it noted that several prior courts had found Amtrak or Conrail not to be state actors for purposes of routine employee decisions (App., *infra*, 9a, 11a-12a). It rejected Judge Leval's view that these cases were distinguishable because they did not address conduct with broad public consequences for speech by noting that one employee case, *Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985), included a First Amendment claim (App., *infra*, 9a-10a). The panel majority made no attempt to compare the facts of government involvement in the earlier cases with the facts here.

While the district court had found that *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), and its progeny compelled a finding that Amtrak and the federal government had a "symbiotic relationship" (App., *infra*, 5b-6b), the panel majority made no attempt to distinguish *Burton*, and instead

simply stated in a footnote that "[s]ome commentators have suggested" that its authority has been "curtailed" (*id.* at 8a n.1).

The panel majority did not address Judge Leval's general conclusion that it would be "inconceivable" for an entity so entwined with the federal government to have the constitutional right to regulate public speech access to Penn Station. Instead, it simply noted that although Amtrak would be free as a constitutional matter to donate its billboards to the support of the incumbent President's election, a federal election statute would prohibit such donations (App., *infra*, 11a).

Chief Judge Newman dissented (App., *infra*, 13a). Agreeing with Judge Leval, he concluded that the "extensive involvement of the Government in the structure and financing of Amtrak" qualifies Amtrak as a "governmental actor, subject to First Amendment limitations, when it undertakes to regulate the political content of advertisements on billboards" (*id.* at 14a).

Chief Judge Newman dismissed the majority's reliance on *Myron*, noting that although the plaintiff in *Myron* had bolstered his employment claim with an allegation of a First Amendment violation, "what [the court of appeals was] placing beyond constitutional scrutiny were Conrail's 'personnel decisions' " (App., *infra*, at 14a). In his view, *Myron*'s "oblique First Amendment ruling" did not mean that Amtrak could never be a state actor in regulating speech (*id.* at 15a).

Judge Newman noted that while the panel majority had dismissed the threat of outright donations of advertising space to federal candidates because they would violate criminal statutes, it did not address any of Judge Leval's other examples of the consequence of deciding that Amtrak was not a state actor, namely, that Amtrak could selectively accept advertisements that favor one side of the abortion debate or advocate adherence to a particular religion or sell advertising space only to candidates it favors (App., *infra*, at 15a). More-

over, Judge Newman noted that the availability of "a limited statutory bar to one aspect of the serious concerns raised by the District court is no answer to [petitioner]'s constitutional claim" (*id.*).

On the merits of petitioner's First Amendment claim, Judge Newman reasoned that while damages or declaratory relief would be appropriate, an injunction requiring display of the advertisement would not (App., *infra*, 15a-16a).

REASONS FOR GRANTING THE WRIT

The court of appeals' decision treats Amtrak, an entity that is public in every aspect but name, as private for constitutional purposes. It does so even where Amtrak is regulating speakers' access to Penn Station, property purchased with federal tax dollars and one of the most public spaces in New York City. There are four interrelated reasons for granting the writ:

(1) The court of appeals' decision has broad consequences for constitutional protections, because it allows an entity created and controlled by the government to selectively allocate valuable government-purchased property to speakers on political grounds, without any constitutional limitation.

(2) In conflict with at least four other circuits, the court of appeals justified its conclusion by holding that "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation." App., *infra*, 10a. The First, Fifth, Seventh, and Ninth Circuits have expressly rejected such a sliding scale analysis, and this Court has consistently applied the same state action standards to equal protection and First Amendment claims.

(3) The court of appeals' holding that Amtrak is not a state actor also conflicts with decisions of the District of Columbia, Sixth, and Eighth Circuits, which have held that government

appointment of a majority of board members is itself sufficient to establish state action.

(4) Finally, the decision conflicts with this Court's state action jurisprudence, and particularly with *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). Yet the court of appeals made no attempt to apply this Court's doctrine, nor even to distinguish *Burton*. Instead, it merely stated in a footnote that "[s]ome commentators have suggested that more recent Supreme Court cases . . . have curtailed *Burton*'s precedential authority." App., *infra*, 8a n.1. A court of appeals may not disregard this Court's decisions on the basis of commentators' suggestions.

I. THE COURT OF APPEALS' DECISION ALLOWS A GOVERNMENT-CONTROLLED INSTITUTION TO ALLOCATE VALUABLE GOVERNMENT PROPERTY TO SPEAKERS ON POLITICAL GROUNDS

Amtrak, an entity wholly controlled by government appointees and wholly dependent on government for its financial survival, denied Michael Lebron access to government-purchased property based on a policy assertedly barring "political" speech. At the same time, Amtrak granted other political advertisers access to the same government-purchased property. Were a government agency to engage in such activity, there is no question that it would have to justify its actions under First Amendment standards. Yet the court of appeals held that Amtrak need offer no constitutional justification whatsoever, because it is a wholly private entity.

Under the Second Circuit's decision, Amtrak is free to allocate government-purchased property in any way it chooses. It could sell advertising space only to the incumbent Administration during an election campaign. It could offer space only to those who advocate protection of reproductive choice, the rights of workers, and health care reform, while denying access to those who are pro-life, pro-business, and believe in

maintaining the private enterprise system for health care. In short, as a private speaker it is free to selectively allocate speech access on blatantly political grounds. Not only would the First Amendment not be violated by such action, it would affirmatively *guarantee* Amtrak's right to make such choices.

Even if Amtrak had no other government connections, the simple fact that it has been charged with allocating speech access to billions of dollars worth of government-purchased property should raise significant First Amendment concerns. When one adds to the picture the undisputed facts that Amtrak is directly answerable to the United States, the sole owner of its voting stock, that its United States-appointed Board has full authority over the leasing, sale, and use of its properties, and that it continues to exist only by infusions of hundreds of millions of tax dollars every year, the First Amendment implications of its speech access policy become inescapable.

Both then-District Judge Leval and Circuit Judge Newman found it "inconceivable" that an entity so controlled by and dependent upon federal government would be free to engage in blatantly political support of speech. The panel majority's only response was to note that federal election law would bar Amtrak from *donating* its properties to a Presidential candidate during an election campaign. This response is both insufficient and irrelevant.

First, the election laws address only the narrow issue of *donations* to candidates; they would have no applicability whatsoever to a decision to *sell* advertising space only to the incumbent Administration, or to donate space only to those speakers whose political views the Administration endorses. And they have no applicability to the content-based policy challenged here.

Second, the election laws are irrelevant to the state action issue. The fortuitous presence or absence of statutory prohibitions on hypothetical conduct does not determine whether an entity is a state actor. The fact that Congress has criminalized conspiracies to deprive individuals of their civil rights, for example, does not mean that private actors acting in concert with government officials are not also state actors for constitutional purposes. *West v. Atkins*, 487 U.S. 42 (1988). Whether Amtrak is a state actor for this case does not turn on the vagaries of election law.

If the Second Circuit's decision stands, federal, state, and local governments could avoid constitutional limits on their actions merely by labeling as "non-governmental" institutions that are in fact government-subsidized and government-controlled. This Court's state action doctrine is designed to forestall such end-runs around the Constitution.

II. THE COURT OF APPEALS' HOLDING THAT A HIGHER SHOWING OF STATE INVOLVEMENT IS NEEDED FOR FIRST AMENDMENT CLAIMS THAN FOR EQUAL PROTECTION CLAIMS CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND THIS COURT

The court of appeals reached its result by holding that "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation." App., *infra*, 10a.

This holding conflicts with decisions of four other courts of appeals, which have held that the state action standard does not differ depending on the constitutional right asserted. *Downs v. Sawtelle*, 574 F.2d 1, 6 n.5 (1st Cir.) (declining to adopt differential state action analysis, and stating that in any event court would apply same standard to discrimination and fundamental rights claims), *cert. denied*, 439 U.S. 910 (1978); *Adams v. Southern California First Nat'l Bank*, 492 F.2d 324, 333 n.23 (9th Cir. 1973) (rejecting differential state action analysis), *cert. denied*, 419 U.S. 1006 (1974); *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 19 (5th Cir.) (en banc)

(*Burton* state action test applies "in both racial and non-racial cases"), *cert. denied*, 429 U.S. 872 (1976); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975) (Stevens, J.) (state action analysis identical for due process and equal protection claims), *cert. denied*, 425 U.S. 943 (1976). In addition, the Third, Fourth, Sixth, Eleventh, and D.C. Circuits have implicitly rejected such a heightened requirement, applying the "symbiotic relationship" standard established in *Burton*, a race discrimination case, to First Amendment and due process claims.[2]

The court of appeals' holding is also contrary to this Court's decisions. The Court has repeatedly applied state action tests articulated in race discrimination settings to cases raising other constitutional claims, and vice versa. Thus, the Court has applied the *Burton* "symbiotic relationship" analysis to First Amendment and due process claims.[3]

The court of appeals' sliding scale makes no sense in light of the purposes of the state action doctrine. Under the court of

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[2] *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (applying *Burton* analysis to due process and equal protection claim based on homosexual conduct); *Jackson v. Pantazes*, 810 F.2d 426, 430 (4th Cir.1987) (finding state action under *Burton* analysis for a Fourth Amendment claim, against private bail bondsman); *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987) (applying *Burton* analysis to First and Fifth Amendment claims against bank); *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 97-103 (3d Cir. 1984) (finding state action under *Burton* analysis for First Amendment, due process, and sex discrimination claims), *cert. denied*, 471 U.S. 1015 (1985); *Anderson v. USAir, Inc.*, 818 F.2d 49, 56 (D.C. Cir. 1987) (applying *Burton* analysis to Fifth Amendment claim against airline).

[3] *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982) (applying *Burton* analysis to First Amendment claim); *Blum v. Yaretsky*, 457 U.S. 991, 1010-11 (1982) (applying *Burton* analysis to due process claim); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974) (applying *Burton* analysis to due process claim); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 119 (1973) (applying *Burton* analysis to First Amendment claim).

appeals' rationale, had Amtrak denied Lebron access because of the political content of his message *and* because of his gender, it might be a state actor for purposes of the gender discrimination claim, but not for the First Amendment claim. That reasoning misses the point of the state action doctrine—to determine when a putatively private entity should be treated as an official actor, not to create a hierarchy of constitutional rights. The state action doctrine looks to the nature of government involvement in a private entity's actions, the character of the function exercised by the private entity, and other factors that demonstrate government connection or responsibility for an otherwise "private" entity's acts. None of these inquiries should vary depending on the particular constitutional right asserted.[4]

Even if some sort of sliding scale were appropriate, there is no basis for saying that more state involvement need be shown for First Amendment than for sex and race discrimination claims. Under this Court's jurisprudence, a claim of sex discrimination triggers a *lower* standard of scrutiny than a claim of discrimination on the basis of political content.[5] A decision to exclude a speaker because of his political viewpoint triggers the same strict scrutiny as a decision to exclude

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[4] *See Parks v. "Mr. Ford"*, 556 F.2d 132, 153-54 (3d Cir. 1977) (Gibbons, J., concurring) (applying different state action tests would impermissibly allow judges to impose subjective hierarchy of constitutional rights); *Isaacs v. Board of Trustees of Temple Univ.*, 385 F. Supp. 473, 485 n.11 (E.D. Pa. 1974) (Higginbotham, J.) (rejecting argument that courts "should be more reluctant to find 'state action' in cases which do not involve racial discrimination," because it is impossible to create a hierarchy of constitutional rights); Jody Young Jakosa, *Parsing Public From Private: The Failure of Differential State Action Analysis*, 19 Harv. C.R.-C.L. L. Rev. 193 (1984) (differential state action analysis based on hierarchy of rights is inconsistent with purposes of doctrine).

[5] *Compare Texas v. Johnson*, 491 U.S. 397 (1989) (requiring compelling state interest and narrowly tailored means to justify content-based restriction on speech) *with Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny to sex discrimination claims).

a speaker because of his race.[6] Indeed, because speech is a "fundamental right," its selective deprivation triggers strict scrutiny under equal protection analysis as well.[7] Thus, to hold that a higher degree of state involvement is required for First Amendment than for equal protection claims contravenes this Court's established constitutional doctrine.

The First Amendment is as fundamental to our democratic tradition and individual liberties as the Equal Protection Clause. When a nominally "private" entity controlled, owned, and funded by government discriminates against unpopular speakers, it is just as much a state actor as when it discriminates on the basis of gender or race. By holding otherwise, the court of appeals violated established constitutional precedent and created a conflict among the circuits. The Court should resolve this circuit split, and make clear that state action analysis does not vary according to the constitutional right invoked.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS HOLDING THAT GOVERNMENT APPOINTMENT OF A MAJORITY OF BOARD MEMBERS RENDERS AN OTHERWISE PRIVATE ENTITY A STATE ACTOR

The panel holds that an entity whose Board is wholly appointed by the United States is not a state actor, even where the policy at issue was itself approved by the Board. This

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[6] *Compare Texas v. Johnson*, 491 U.S. 397, *with Palmore v. Sidoti*, 466 U.S. 429 (1984) (strict scrutiny required for racial discrimination).

[7] *Carey v. Brown*, 447 U.S. 455, 474 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *see also Downs v. Sawtelle*, 574 F.2d 1, 6 n.5 (1st Cir.) (even if some differential analysis were justifiable, same state action analysis should apply to discrimination claim regarding fundamental rights as to racial discrimination claim), *cert. denied*, 439 U.S. 910 (1978).

holding conflicts with the decisions of the District of Columbia, Sixth, and Eighth Circuits, which have held that when the government appoints a majority of an entity's board or where a significant number of a board's members are government officials, the entity is a state actor. *Foster v. Ripley*, 645 F.2d 1142, 1147 (D.C. Cir. 1981) ("The fact that the majority of the members of the [private corporation's] board of directors are [government] officials in itself is sufficient to find that the government exercises control over the actions of the [private corporation]"); *McVarish v. Mid-Nebraska Community Mental Health Center*, 696 F.2d 69, 71 (8th Cir. 1982) (fact that 12 of board's 17 members "were either appointed by or actual members of county boards of supervisors or commissioners" is sufficient to establish state action); *Chiaffitelli v. Dettmer Hosp., Inc.*, 437 F.2d 429, 430 (6th Cir. 1971) (fact that four of nine board members are appointed by the government and a fifth is a public official is sufficient to make hospital a state actor).[8]

While several courts have found that Amtrak's government-controlled Board does not make it a state actor, *see* cases cited in note 14, *infra*, other courts have found government control of an entity's Board to be virtually sufficient in itself to establish state action. *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194, 1195 (10th Cir. 1988) (relying on *Burton* to find state action where hospital run by private entity, but city had substantial participation in funding, creation, and financial structure of hospital, and appointed three of five board members); *Gilmore v. Salt Lake Community Action Program*, 710

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[8] *See also O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1143 (6th Cir. 1973); *Meredith v. Allen County War Memorial Hosp. Comm'n*, 397 F.2d 33, 35 (6th Cir. 1968); *cf. Adams v. Vandemark*, 855 F.2d 312, 317 (6th Cir. 1988) (finding that government involvement on hospital board is "perhaps the strongest indication of a symbiotic relationship," but finding that government's appointment of one-third of board insufficient to create state action), *cert. denied*, 488 U.S. 1042 (1989).

F.2d 632, 637-38 (10th Cir. 1983) (holding that community action center was state actor where 11 of 30 board members were public officials); *Downs v. Sawtelle*, 574 F.2d at 7-8 (finding hospital to be state actor where town appointed hospital's entire board of directors, and noting that "[o]ther courts also have held that the appointment by the state of a majority of an institution's board is either determinative of or an important factor in establishing state action"); *cf. Madry v. Sorel*, 558 F.2d 303, 305 (5th Cir. 1977) (finding no state action where government members of hospital board were ceremonial, but stating that decision might be different if government's ex officio hospital board members "actually participated to some extent in running the hospital"), *cert. denied*, 434 U.S. 1086 (1978).[9]

Where the government appoints a majority of an entity's board, it has direct influence over that entity's policies. Where, as here, the government also owns all of the entity's voting stock, government control and responsibility is even greater. Under the law of three circuits, these facts would be sufficient to render Amtrak a state actor. The Second Circuit's holding conflicts with those circuits, and its failure even to address these central facts conflicts with decisions of several circuits. This Court should therefore grant certiorari to clarify the significance of government control of a nominally "private" entity's board to the state action inquiry.

[9] Indeed, the Second Circuit itself has held that, when applying the "less stringent" state action test it applies to race discrimination claims, the government's appointment of a majority of a private entity's Board may warrant a finding of state action "even if the court should find only some other significant evidence of 'state action.'" *Jackson v. Statler Found.*, 496 F.2d 623, 634-35 (2d Cir. 1974).

IV. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S STATE ACTION DECISIONS, AND PARTICULARLY WITH *BURTON V. WILMINGTON PARKING AUTHORITY*

This Court has *never* concluded that state action was absent where the government had as much direct control over an entity as the United States has over Amtrak. To find that an entity whose Board the government appoints and whose voting stock the government wholly owns is not a state actor, the court of appeals had to ignore virtually all of this Court's state action jurisprudence.

In particular, it pointedly ignored this Court's decision in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715. As the district court found, the showing of state involvement in Amtrak's decision challenged here is far more extensive than that found sufficient to establish state action in *Burton*. Yet instead of attempting to distinguish *Burton*, the panel simply dropped a footnote claiming that "[s]ome commentators" have suggested that its authority is curtailed (App., *infra*, 8a n.1). The opinions of commentators, however, have no binding authority over the Second Circuit. This Court's decisions do.

In *Burton*, the Court held that private conduct qualifies as state action when "[t]he State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity." 365 U.S. at 725. In that case, a private restaurant in a public parking garage refused to serve black customers. The Court cited three factors in finding a "symbiotic relationship" between the private actor and government: (1) close financial interdependence between the private and governmental entities, *id.* at 724; (2) governmental authority over the private entity, *id.* at 725; and (3) the sharing of physical space between the private and governmental entities, *id.* at 724-25.

The *Burton* Court found first that Delaware's financial interests were closely tied to the restaurant's discrimination

because the restaurant rented the property from the state, its customers parked in the state's garage, and the restaurant's rationale for discriminating was revenue-driven: it feared losing business from potential white customers. *Id.* at 724. Second, the *Burton* Court noted that Delaware *could* have controlled the private restaurant's conduct by requiring that it not discriminate as a condition of its lease. *Id.* at 725. And third, because the restaurant was "an integral part of a public building devoted to a parking public service," the Court found it would be a "grave injustice" to permit conduct in the private sections of the building that was constitutionally prohibited in the public sections. *Id.* at 724-25.

On each of these three factors, the facts here are stronger than in *Burton*. First, because the United States bankrolls Amtrak, every dollar of Amtrak's revenues is directly the United States' concern. The financial ties in *Burton* were indirect at best; here, they are as direct as if Amtrak were literally a government agency. Moreover, just as the restaurant in *Burton* justified its exclusion of black customers on revenue grounds, so here Amtrak justifies its policy by pointing to its potential effect on revenues from offended passengers. C.A. App. 107, 513-16, 522-24. Thus, the government has a direct revenue interest in the challenged exclusionary policy.

Second, where the *Burton* Court found state action supported by the mere fact that Delaware *could have* required the restaurant to abide by anti-discrimination principles as a term of its lease, here the United States owns all of Amtrak's voting stock and hand-picks Amtrak's Board, which approved the policy challenged here. *Cf. Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957) (suggesting that fact that state agency is a trustee for private organization is sufficient without more to make private organization a state actor).

Third, even more so than the parking garage at issue in *Burton*, Penn Station is a large public space shared by gov-

ernmental and non-governmental entities. Because of Amtrak's close intermingling of space and services with state and city transportation authorities at Penn Station, it would be "a grave injustice" to allow Amtrak to engage in the suppression of political speech that its indisputably governmental partners plainly could not undertake.[10]

Thus, unless *Burton* is no longer good law, state action is mandated by the facts presented here. While the court of appeals questioned *Burton*'s authority in a footnote, this Court has consistently cited *Burton* with approval in its state action decisions and has never suggested that *Burton* has been overruled.[11]

Indeed, the only case the court of appeals cited as possibly curtailing Burton's authority, *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987), supports state action here. In *San Francisco Arts & Athletics*, this Court carefully distinguished *Burton*, noting that plaintiffs "failed to demonstrate that the Federal Government *can or does* exert any influence over the exercise of the USOC's enforcement decisions." 483 U.S. at 547 n.29 (emphasis added). The Court expressly noted that

> '[t]he USOC is an independent body, and *nothing in its chartering statute gives the federal government the right to control that body or its officers* . . . [Nor was] the federal government . . . able to exercise any type of "*de facto*" control over the USOC.'

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[10] *International Soc. for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (publicly owned airport governed by First Amendment); *Penthouse Int'l v. Koch*, 599 F. Supp. 1338 (S.D.N.Y. 1984) (New York subways governed by First Amendment); *Kissinger v. New York City Transit Auth.*, 274 F. Supp. 438 (S.D.N.Y. 1967) (same).

[11] *See, e.g., Edmonson v. Leesville Concrete Co., Inc.*, 111 S. Ct. 2077, 2083 (1991); *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 547 n.29 (1987).

Id. at 545 n.27 (quoting *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181, 1194 (D.D.C.), *aff'd mem.*, 701 F.2d 221 (D.C. Cir. 1980) (emphasis added)). Here, by contrast, the government has direct authority over Amtrak, both by virtue of its sole ownership of voting stock and its wholesale control of the Board. Moreover, the Board has exercised that control with regard to the specific advertising policy challenged here.

This Court relied on *Burton* to find state action as recently as 1991, when it held that private attorneys for private civil litigants should be treated as state actors when they exercise peremptory challenges. *Edmonson v. Leesville Concrete Co., Inc.*, 111 S. Ct. 2077 (1991). Just as "without the overt, significant participation of the government, the peremptory challenge system . . . simply could not exist," *Edmonson*, 111 S. Ct. at 2084, so without the overt, significant participation of the United States, Amtrak could not exist. Without the United States' annual subsidies—more than $3.3 billion in the last five years alone—Amtrak would have gone bankrupt long ago. In fact, the United States created Amtrak in 1970 precisely because the few remaining private railroads were fast approaching insolvency.[12]

Through its creation, subsidy, and control of Amtrak, the United States has, like the courts in the peremptory challenge setting, " 'not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.' " *Edmonson*, 111 S. Ct. at 2085 (quoting *Burton*, 365 U.S. at 725). The United States purchased Penn Station, and through its wholly controlled Amtrak Board it has placed its power, property, and prestige behind the policy that excluded Lebron's advertisement. Like

[12] H.R. Rep. No. 1580, 91st Cong., 2d Sess. 1, 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4735 (Amtrak created "to prevent the complete abandonment of intercity rail passenger service"). Moreover, Amtrak Vice President Anthony DeAngelo testified that running a passenger railroad is no longer a viable private business; it can only be done through massive government intervention. C.A. App. 442.

a trial court accepting a peremptory challenge, the government here has " 'create[d] the legal framework governing the [challenged] conduct,' and in a significant way has involved itself with invidious discrimination." *Edmonson*, 111 S. Ct. at 2085 (quoting *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988)).

The court of appeals neither discussed nor applied *any* of these binding principles. Other than setting forth the double standard noted above, it simply relied on the fact that it and several other lower courts had previously held that Amtrak and/or Conrail were not state actors *for the purpose of personnel decisions. See, e.g., Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 55-56 (2d Cir. 1985). Those cases are clearly not controlling here, and may be wrongly decided in light of the full extent of government involvement in Amtrak.

Even if they were correctly decided, however, *Myron* and the Amtrak employment cases are distinguishable on several grounds.[13] Dispositive to the outcome of all these cases was the fact that the government was not directly involved in the personnel actions that had triggered the suits.[14] That fact

[13] This Court has noted that a state action inquiry is "necessarily fact-bound" (*Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)) and requires "sifting facts and weighing circumstances" (*Burton*, 365 U.S. at 722). Although the panel majority formally acknowledged that obligation (App., *infra*, 8a), it sifted no facts and weighed no circumstances. It simply cited cases holding that Amtrak (or Conrail) was a state actor without considering whether the facts of those cases justified the outcome in this one.

[14] *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 55-56 (2d Cir. 1985) ("despite an obviously close relationship, the federal government has not 'so far insinuated itself into a position of interdependence' with Conrail that the latter's personnel decisions can be considered federal action" (quoting *Burton*, 365 U.S. at 725)); *Anderson v. National R.R. Passenger Corp. (AMTRAK)*, 754 F.2d 202, 204 (7th Cir. 1984) ("There is no allegation that the government is involved with Amtrak's personnel policies or decisions."); *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725, 728 (N.D. Ill. 1984); *Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169, 173 (M.D. Ala. 1982).

(footnote continued)

plainly distinguishes this case, where the policy Lebron challenged was approved by Amtrak's government-controlled Board.[15]

In addition, half the cases the panel majority cited involved Conrail, a very different entity. Conrail, which was privatized in 1987, made a profit for half of its existence and never received direct government subsidies. At the time of the challenged conduct in *Myron*, Conrail's only government "support" was in the form of loans and investments, its voting stock was not wholly owned by government, and its Board was made up of a majority of non-government-appointed members. 752 F.2d at 54-55.

Finally, a routine employment decision cannot be equated with a Board-approved policy affecting the content of speech to which thousands of members of the public are exposed every day. As Judge Leval reasoned, where an entity with substantial governmental connections adopts a policy with such sweeping public consequences, the court should be more inclined to find state action.

Of the five decisions relating to Amtrak, two do little more than rely on the analysis of the other three. *Wilson v. Amtrak Nat'l R.R. Corp.*, 824 F. Supp. 55, 57-58 (D. Md. 1992); *Railway Labor Executives' Ass'n v. National R.R. Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988). Similarly, the Conrail cases all simply follow *Myron* without further analysis. *G. & T. Terminal Packaging, Inc. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1237 (3d Cir. 1987); *Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 682-83 (7th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987); *Verdon v. Consolidated Rail Corp.*, 828 F. Supp. 1129, 1137 (S.D.N.Y. 1993).

[15] The Amtrak cases also rely on Amtrak's having been established as a "for-profit" corporation. However, in 1978, Congress amended 45 U.S.C. § 541 so that it no longer says that Amtrak is a for-profit corporation, but that it shall be "operated and managed as a for profit corporation" in a candid attempt "to conform the law to reality." H.R. Rep. No. 1182, 95th Cong., 2d Sess. 1, 15, (1978), *reprinted in* 1978 U.S.C.C.A.N. 2313, 2323 ("This amendment recognizes that Amtrak is not a for-profit corporation.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1994

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1494—August Term, 1992

(Argued: April 27, 1993 Decided: December 27, 1993)

Docket No. 93-7127

MICHAEL A. LEBRON,

Plaintiff-Counter-Defendant-Appellee,

—against—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Defendant-Appellant,

TRANSPORTATION DISPLAYS, INCORPORATED,

Defendant-Counter-Claimant.

Before:

LUMBARD, NEWMAN,* and MAHONEY,

Circuit Judges.

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* Judge Newman became chief judge of the Second Circuit Court of Appeals on July 1, 1993.

Defendant-appellant National Railroad Passenger Corporation (Amtrak) appeals from a judgment entered February 11, 1993 in the United States District Court for the Southern District of New York, Pierre N. Leval, then-*District Judge*, that required Amtrak and defendant-counter-claimant Transportation Displays, Incorporated to display a political advertisement prepared by plaintiff-counter-defendant-appellee Michael A. Lebron on a large billboard known as the Penn Station Spectacular. The district court ruled that Amtrak was a governmental actor, and had violated the First Amendment by refusing to display Lebron's advertisement pursuant to a contract leasing the Spectacular to Lebron for the months of January and February 1993.

We reverse. Chief Judge Newman dissents in a separate opinion.

MAHONEY, *Circuit Judge*:

Defendant-appellant National Railroad Passenger Corporation (Amtrak) ("Amtrak") appeals from a judgment entered February 11, 1993 in the United States District Court for the Southern District of New York, Pierre N. Leval, then-*District Judge*.* The judgment of the district court enjoined Amtrak and an advertising agency that performs services for Amtrak, defendant-counterclaimant Transportation Displays, Incorporated ("TDI"), to display a political advertisement prepared by plaintiff-counter-defendant-appellee Michael A. Lebron on a large billboard known as the Spectacular in New York City's Pennsylvania Station ("Penn Station"). Lebron had

* Judge Leval became a member of the Second Circuit Court of Appeals on November 8, 1993.

entered into a contract with TDI to lease the Spectacular for January and February 1993.

The district court ruled that because of the pervasive involvement of the federal government in Amtrak's structure and operations, Amtrak's conduct in controlling speech on its billboards must be deemed governmental, rather than private, in nature, and that Amtrak had violated the First Amendment by refusing to display Lebron's advertisement. *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 811 F. Supp. 993 (S.D.N.Y. 1993).

We conclude that Amtrak is not a governmental actor subject to the strictures of the First Amendment, and accordingly reverse.

Background

In August 1991, Lebron, an artist who creates billboard displays (frequently involving commentary on public issues), first contacted TDI, which manages the leasing of many of Amtrak's billboards, about contracting for billboard space in Penn Station. The Spectacular, a curved back-lit display space approximately 103 feet wide by ten feet high, dominates the west wall of the rotunda on the upper level of Penn Station where thousands of passengers pass each day. Lebron and TDI eventually agreed that Lebron would pay $16,500 per month to rent the Spectacular for January and February 1993. On November, 30, 1992, Lebron and TDI signed an agreement (the "Lease") to that effect.

In negotiating the Lease, Lebron dealt primarily with William B. Schwartz, a TDI account executive, who informed Lebron that displays for the Spectacular containing obscenity or violence were unacceptable.

Schwartz asked Lebron about the content of the advertisement that Lebron intended for the Spectacular, but Lebron declined to disclose it, explaining that while his work was generally political, he wanted to keep the specific nature of his advertisement for the Spectacular confidential prior to its display. Schwartz did not then suggest that there might be a problem with political advertisements on the Spectacular.

Although Amtrak authorized TDI to manage the leasing of Amtrak's billboard space, Amtrak at all times retained the right to approve or reject all advertising copy that would appear on its billboards. (In practice, Amtrak only reviewed displays that were to appear on the Spectacular.) Thus, the Lease contained the following language:

> All advertising copy is subject to approval of TDI and [Amtrak] as to character, text, illustration, design and operation.
>
> . . . .
>
> If for any cause beyond its control TDI shall cease to have the right to continue the advertising covered by this contract, or if [Amtrak] should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.

On December 2, 1992, Lebron submitted a color photocopy of the work he intended to display on the Spectacular to TDI, which TDI promptly forwarded to Amtrak. Lebron characterizes the advertisement as "an allegory about the destructive influence of a powerful, urban, materialistic and individualistic culture on rural, community based, family-oriented and religious cultures." The district court described it as follows:

> The work is a photomontage, accompanied by considerable text. Taking off on a widely circulated Coors beer advertisement which proclaims Coors to be the "Right Beer," Lebron's piece is captioned "Is it the Right's Beer Now?" It includes photographic images of convivial drinkers of Coors beer, juxtaposed with a Nicaraguan village scene in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a tail of fire, as if it were a missile. The accompanying text, appearing on either end of the montage, criticizes the Coors family for its support of right-wing causes, particularly the contras in Nicaragua. Again taking off on Coors' advertising which uses the slogan of "Silver Bullet" for its beer cans, the text proclaims that Coors is "The Silver Bullet that aims The Far Right's political agenda at the heart of America."

811 F. Supp. at 995.

Anthony DeAngelo, Amtrak's vice president for real estate and operations development, viewed the photocopy and disapproved the display of Lebron's advertisement on the Spectacular. In a letter dated December 23, 1992, Amtrak notified TDI of its rejection, stating that "Amtrak's policy is that it will not allow political advertising on the [S]pectacualar advertising sign."

Lebron then commenced this action against Amtrak and TDI, claiming violations of his First and Fifth Amendment rights as well as his contractual rights under the Lease. He sought equitable relief to compel Amtrak and TDI to display his ad on the Spectacular, or alternatively, damages for breach of the Lease. After expedited discovery and a trial on documentary submissions, the district court ruled that "in rejecting [Lebron's] contract to

display his art on its billboard Amtrak was engaged in governmental action and . . . the standards employed by Amtrak in rejecting his work violated its obligations under the First Amendment." 811 F. Supp. at 1005. In view of this conclusion, the district court did not reach Lebron's contractual claim. *Id.* at 1005 n.5. Judgment was entered enjoining Amtrak and TDI to display Lebron's advertisement on the Spectacular "for two months beginning on the date that follows by six (6) business days the denial or expiration of any stay of [the district court's] judgment by the highest court having jurisdiction to issue such a stay."

Amtrak applied to the district court for a stay of its judgment pending appeal to this court. The district court denied the application, but "permit[ted] delay in compliance with the judgment" for fourteen days to allow an application for a stay to this court, while recommending against the grant of any such application.

This appeal followed. In response to a motion by Amtrak, this court stayed the execution of the district court's judgment pending appeal and expedited the appeal.

Discussion

The First Amendment's directive "[t]hat 'Congress shall make no law . . . abridging the freedom of speech, or of the press' is a restraint on government action, not that of private persons." *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 114 (1973) (plurality opinion) (citing *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952)). Thus, in considering Lebron's claim that Amtrak violated his right to free speech, the

threshold inquiry is whether Amtrak's refusal to run Lebron's advertisement on the Spectacular constitutes government action.

Government action is most readily found when the conduct at issue is performed by a government entity. However, that is not the case here. The Rail Passenger Service Act of 1970 (the "Act"), 45 U.S.C. § 501 (1988) *et seq.*, created Amtrak as a private, for-profit corporation under the District of Columbia Business Corporation Act. *See* 45 U.S.C. § 541 (1988). This legislation rejected earlier suggestions that the nation's passenger rail service be nationalized. *See* Laurence E. Tobey, *Costs, Benefits, and the Future of Amtrak*, 15 Transp. L.J. 245, 252-53 (1987). Accordingly, the Act specifies that Amtrak is "not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government." § 541; *see also National R.R. Passenger Corp. v. Atchison T. & S. F. Ry. Co.*, 470 U.S. 451, 454-55 (1985).

The government action inquiry is more difficult when the challenged conduct is performed not by the government itself, but by a private entity. The Supreme Court has articulated a variety of approaches for discerning the presence of government action in the activities of private entities. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (private conduct deemed government action when government coerces or significantly encourages that conduct); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158-59 (1978) (private entity may be deemed government actor when performing role traditionally performed exclusively by government); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (private action deemed governmental when "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that

of the State itself"); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (private action deemed governmental when the government "has so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a joint participant in the challenged activity").[1]

As the Supreme Court has noted, "formulating an infallible test" of government action is an " 'impossible task.' " *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) (quoting *Burton*, 365 U.S. at 722). Rather, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722.

In this case, the district court concluded that "based on examination of the federal government's deep and controlling entwinement in Amtrak's structure and operation, . . . when Amtrak undertakes to control the content of speech on its billboards, its conduct must be deemed governmental rather than private." 811 F. Supp. at 997. Supporting this assessment, the district court described Amtrak as "a corporation whose directors are appointed

[1] Some commentators have suggested that more recent Supreme Court cases, and especially the Court's ruling that the United States Olympic Committee is not a governmental actor subject to constitutional restraints in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542-47 (1987), have curtailed *Burton*'s precedential authority. *See* Laurence H. Tribe, *American Constitutional Law* § 18-3, at 1701 n.13 (2d ed. 1988); Marcia Berman, *An Equal Protection Analysis of Public and Private All-Male Military Schools*, 1991 U. Chi. Legal F. 211, 225-26; *see also Jackson*, 419 U.S. at 358 ("actual holding" of *Burton* limited to lessees of public property); *Adams v. Vandemark*, 855 F.2d 312, 317 n.7 (6th Cir. 1988) ("The more recent Supreme Court cases in this area appear to have limited the broad realm of state action *Burton* suggested."), *cert. denied*, 488 U.S. 1042 (1989); *Imperiale v. Hahnemann Univ.*, 776 F. Supp. 189, 195-96 (E.D. Pa. 1991) (same), *aff'd*, 966 F.2d 125 (3d Cir. 1992) (per curiam).

by the President, whose operations are financed by the federal government, and whose properties, in major part, are mortgaged to the federal government." *Id.* at 998.

We need not reiterate the details underlying this description, *see id.* at 997-98 and nn. 3-8, because we do not take issue with this aspect of the district court's opinion, but rather with the legal conclusion that is derived from it. As the district court pointed out, there are "a number of cases in which discharged employees charged either Amtrak or the similarly structured Consolidated Rail Corporation ('Conrail') with unconstitutional governmental action . . . [in which] the courts held that Amtrak's (or Conrail's) actions in dealing with its employees were not deemed to be governmental action." *Id.* at 999 (collecting cases).

One of these cases was *Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985). In that case, we held that:

> [D]espite federal funding, regulation, stock ownership and representation on the board of directors, there is nothing resembling federal supervision of day-to-day activities. In sum, we conclude that despite an obviously close relationship, the federal government has not "so far insinuated itself into a position of interdependence" with Conrail that the latter's personnel decisions can be considered federal action.

Id. at 55-56 (footnote omitted) (quoting *Burton*, 365 U.S. at 725).

The district court distinguished *Myron* and the similar precedents cited by the district court as follows:

> The fact that Amtrak is considered a private employer in administering its employment of personnel does not mean it will be deemed private when it regulates speech. Whether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue. As Judge Friendly explained in *Wahba v. New York University*, 492 F.2d 96, 100 [(2d Cir.), *cert. denied*, 419 U.S. 874 (1972)], "we do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims concerning different forms of governmental involvement and other constitutional guarantees." *See also Weise v. Syracuse University*, 522 F.2d 397, 404 (2d Cir. 1975).

811 F. Supp. at 999 (footnote omitted).

We are not persuaded by this analysis. *Myron* addressed the "government action" issue in the specific context of a "claim that Conrail violated [Myron's] First and Fifth Amendment rights by discharging him for representing various people with interests adverse to Conrail." 752 F.2d at 54. We therefore decline to regard *Myron* as a precedent confined to employee matters that does not provide strong guidance, if not controlling authority, for our decision in this First Amendment case.

Wahba also involved an assertion of First Amendment claims, but we were nonetheless "unable to discern the government action necessary to sustain . . . them." 492 F.2d at 98. *Weise* ruled that a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue, as is so often the case in employment litigation, than when there is a claim of a First Amendment violation. 522 F.2d at 405. Specifically,

although we reversed and remanded the dismissal of plaintiffs' § 1983 claims that they were denied employment or had their employment terminated because of sex discrimination, 522 F.2d at 400, 413, we explicitly stated that: "If our concern in this case were with discipline and the First Amendment, the alleged indicia of state action—funding and regulation—would most likely be insufficient." 522 F.2d at 405.

The district court expressed concern that in the absence of First Amendment restraints flowing from a finding of government action, Amtrak could post its own political advertisements on the Spectacular, postulating the example that Amtrak "would be free under the First Amendment to donate its billboards to the support of the incumbent President's election." 811 F. Supp. at 1000. Whatever its constitutional implications, which we do not address, such conduct would constitute a criminal violation of federal law. *See* 2 U.S.C. §§ 441b, 437g(d) (1988); *see also Stern v. Federal Election Comm'n*, 921 F.2d 296, 297 (D.C. Cir. 1990) (noting § 441b prohibition of corporate political contributions).

Our opinion in *Myron* accords with numerous cases that have concluded that Amtrak and Conrail are not subject to constitutional restraints upon government action. *See, e.g., Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 682-83 (7th Cir. 1987) (following *Myron*); *G. & T. Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1236 (3d Cir. 1987) ("Every court that has considered the matter has concluded that Conrail is not a governmental actor for purposes of constitutional analysis."), *cert. denied*, 485 U.S. 988 (1988); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987) (per curiam) (following *Myron*); *Anderson v. National R.R. Passenger Corp. (Amtrak)*, 754 F.2d 202, 204-05 (7th Cir.

1984) (per curiam); *Verdon v. Consolidated Rail Corp.*, 828 F. Supp. 1129, 1137 (S.D.N.Y. 1993); *Wilson v. Amtrak Nat'l R.R. Corp.*, 824 F. Supp. 55, 57-58 (D. Md. 1992); *Railway Labor Executives' Ass'n v. National R.R. Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988); *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725, 727-29 (N.D. Ill. 1984); *Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169, 172-73 (M.D. Ala. 1982).

In view of this unvarying line of authority, and the fact that our pertinent precedent addressed an issue of First Amendment retaliation, *see Myron*, 752 F.2d at 54, we conclude that Amtrak's refusal to run Lebron's advertisement on the Spectacular was not government action, and accordingly is not to be tested against the requirements of the First Amendment. Thus, we do not reach the merits of Lebron's First Amendment claim.

In view of the dismissal of Lebron's only federal claim, it will not be appropriate for the district court to address his contract claim on remand.[2] *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966); *Eatz v. DME Unit of Local Union No. 3*, 973 F.2d 64, 67 (2d Cir. 1992). Lebron is free to pursue that claim in state court. Under N.Y. Civ. Prac. L. & R. 213 (McKinney 1990), Lebron's contract claim is subject to a six year statute of limitations. *See also id.* 205(a) (McKinney Supp. 1993), *id.* cmt. 205:2 (McKinney 1990) (in any event, Lebron may sue in state court within six months of dismissal in federal court).

[2] Correspondingly, TDI's counterclaim for a declaratory judgment that it is entitled to terminate the Lease will not be decided in this action.

Conclusion

The judgment of the district court is reversed and the case is remanded with the instruction to dismiss the complaint. As stated at oral arugment, Lebron's motion to strike pages from the joint appendix and for double costs and attorney fees is denied; his motion to file a supplemental volume of exhibits is granted.

JON O. NEWMAN, *Chief Judge*, dissenting:

The issue presented by this appeal is whether Amtrak, formally known as the National Railroad Passenger Corporation, is subject to the First Amendment when it acts to deny advertising space on the basis of political content. Because I believe the First Amendment limits Amtrak in making such decisions, I respectfully dissent.

The Court does not dispute the detailed findings of the District Court as to the extent of the Government's role in the structure and financing of Amtrak, including the undeniable fact that six members of the nine-member Amtrak board are appointed by the President of the United States, two others by the Government as owner of Amtrak's preferred stock, and the ninth member by the other board members. Instead, the Court relies on prior cases that have ruled Amtrak and Conrail not to be governmental actors when they discharge or fail to rehire workers, *see, e.g., Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 682-83 (7th Cir. 1987); *Anderson v. National R.R. Passenger Corp. (Amtrak)*, 754 F.2d 202, 204-05 (7th Cir. 1984), even where First Amendment rights are peripherally involved, *see, e.g., Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54-56 (2d Cir. 1985).

However, it has long been the law in this Circuit, and the Supreme Court has given no contrary indication, that the state action determination is dependent in part on the nature of the constitutional right alleged to have been impaired. *See Weise v. Syracuse University*, 522 F.2d 397, 404 (2d Cir. 1975); *Wahba v. New York University*, 492 F.2d 96, 100 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974). In the District Court, Amtrak conceded that, if it restricted service to passengers on the basis of race, religion, or national origin, it would be deemed a governmental actor in that respect. *See Lebron v. National R.R. Passenger Corp. (Amtrak)*, 811 F. Supp. 993, 999 (S.D.N.Y. 1993).

In view of the extensive involvement of the Government in the structure and financing of Amtrak, I agree with then-District Judge Leval that Amtrak is a governmental actor, subject to First Amendment limitations, when it undertakes to regulate the political content of advertisements on its billboards. Our ruling in *Myron* is not a precedent for forgoing all First Amendment scrutiny with respect to Amtrak. We there ruled that Conrail was not subject to First Amendment limitations for discharging an employee for disloyalty. Though the employee, an attorney, had sought to reenforce his employment claim with an allegation that his First Amendment right to represent fellow employees in litigation was being impaired by his discharge, we made it clear that what we were placing beyond constitutional scrutiny were Conrail's "personnel decisions." *Myron*, 752 F.2d at 55-56. At most an indirect First Amendment issue was implicated. By contrast, in the pending case Amtrak purports to have complete insulation from a core First Amendment claim—that it determines the use of its resources, in this case, the availability of its advertising spaces, on the basis of political views.

In permitting this frontal First Amendment challenge to be governed by the oblique First Amendment ruling in *Myron*, the Court dismisses rather brusquely the District Court's forcefully articulated concerns as to the consequences of First Amendment exemption for Amtrak in its advertising decisions. Judge Leval pointed out that, without First Amendment limitation, Amtrak would be free to sponsor advertisements on its billboards taking sides with respect to political contests, or promoting or denigrating particular religions, or advocating its view on contentious public issues like abortion. *See Lebron*, 811 F. Supp. at 1000. The Court makes no response with respect to the prospect of Amtrak's using its advertising resources on matters of religion or public issues, and rejects the concern about politics by pointing out that "donation" of advertising space would run afoul of existing statutes. No mention is made of the District Court's valid concern about Amtrak's opportunity to sell advertising space only to candidates it favors.

In any event, the existence of a limited statutory bar to one aspect of the serious concerns raised by the District Court is no answer to Lebron's constitutional claim. The fact that a corporation like Amtrak, organized by authority of an act of Congress, would be criminally liable if its donation of advertising space were deemed to be a political contribution, *see* 2 U.S.C. §§ 441b, 437g(d) (1988), provides no remedy for a civil plaintiff like Lebron who claims a First Amendment violation because his offer to purchase advertising space has been rejected, allegedly without required limitations on Amtrak's discretion, because of the ad's political content.

Though I disagree with the majority's ruling requiring the outright dismissal of Lebron's suit, I would not uphold the District Court's injunction requiring Amtrak to display

Lebron's ad. Amtrak's advertising policy may well run afoul of First Amendment limitations, as the District Court ruled, notably because the current "vague policy provides Amtrak officials with precisely the kind of unfettered discretion to control speech that the Supreme Court has held to contravene the First Amendment," *Lebron*, 811 F. Supp. at 1003. But the policy, despite its vagueness, is claimed to prohibit political messages. This is not a case where an official, subject to First Amendment restraint, has used unfettered discretion to deny permission to use a traditional public forum like city streets for a parade. *See Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). Amtrak's billboard space in Pennsylvania Station, even if used in the past for ads of a public service nature, has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for promoting "The Far Right's political agenda." *Lebron*, 811 F. Supp. at 995. On the present record, it is not an appropriate use of a federal court's equity power to force Amtrak to venture so extensively into the political arena. If the denial of advertising space under Amtrak's existing policies encounters First Amendment objections, damage remedies and declaratory relief will have to suffice.

For these reasons, I dissent from the judgment ordering the complaint dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

92 Civ. 9411 (PNL)
Dated: February 5, 1993

MICHAEL A. LEBRON,

Plaintiff,

—against—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) and TRANSPORTATION DISPLAYS, INCORPORATED,

Defendant.

OPINION AND ORDER

Findings of Fact and Conclusions of Law

PIERRE N. LEVAL, U.S.D.J.

This is a so-called "Bivens" action,[1] brought under the First Amendment by an artist, Michael A. Lebron, would-be lessor of a gigantic billboard in New York's Pennsylvania Station. The primary defendant is Amtrak, the National Passenger Railroad Corporation, which, as owner of the billboard, rejected the two-month lease plaintiff had contracted for with Amtrak's leasing agent because plaintiff's display was "political." Plaintiff contends the rejection was inconsistent with the requirements of the First Amendment. He sues to invalidate the rejection so that he can obtain the benefit of his lease agreement.

[1] *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

As an alternative theory, plaintiff alleges that Amtrak and its leasing agent Transportation Displays Incorporated ("TDI"), the second defendant, are estopped by reason of delay from denying plaintiff's contract.

On the consent of the parties, trial was conducted on an expedited basis, upon written submissions. The court's findings of fact and conclusions of law are as follows.

Background

Lebron is an artist who creates works for display on billboards. His works often involve commentary on public issues. *See, e.g., Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984). During 1991 and 1992, he made plans for a photomontage for a particular billboard in Penn Station. The billboard is known as the Spectacular; it is a curved, back-lit display space approximately 103 feet wide and 10 feet high, covering the east-facing wall of the rotunda area, facing passengers (and others) who walk westward toward the waiting areas, ticket booths, and train platforms.

Defendant TDI is an advertising agency that handles the leasing of billboards for many of Amtrak's properties and for other billboard owners in the rail transportation system. Amtrak has authorized TDI to lease the billboards in Penn Station. While the licensing agreement reserves for Amtrak the right of approval of all advertising copy, in practice, Amtrak does not review advertising copy, excepting advertisements for the Spectacular.

In August 1991, Lebron first contacted TDI about contracting for billboard space in Penn Station. He spoke from time to time with William B. Schwartz, a TDI account executive. Schwartz told him that while no displays would be accepted that included obscenity or violence, there were no other policy restrictions on advertising.

The Spectacular was available for two months at the beginning of 1993. Lebron and TDI reached agreement on financial

terms of $18,500 a month for January and February 1993. In August 1992, Schwartz gave Lebron the standard rental form contract, which Lebron signed and returned. During the negotiations, Schwartz asked Lebron what he would display on the billboard. Lebron responded that in general his work was political, although it often looked like advertising, but that he preferred to keep confidential the specific content of the work he was creating for the Spectacular. Schwartz did not suggest that the political nature of the work would be a problem.

On November 30, 1992, TDI signed the agreement. The terms of the contract included the following:

> All advertising copy is subject to approval of TDI and the Transportation Facility concerned [*i.e.*, the owner of the billboard] as to character, text, illustration, design and operation.
>
> If for any cause beyond its control TDI shall cease to have the right to continue the advertising covered by this contract, or if the Transportation Facility concerned should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.

During the fall, Lebron worked on creation of his piece for the 10 x 103 foot space. On December 2, 1992, he provided TDI with a color photocopy of his piece. The work is a photomontage, accompanied by considerable text. Taking off on a widely circulated Coors beer advertisement which proclaims Coors to be the "Right Beer," Lebron's piece is captioned "Is it the Right's Beer Now?" It includes photographic images of convivial drinkers of Coors beer, juxtaposed with a Nicaraguan village scene in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a tail of fire, as if it were a missile. The accompanying text, appearing on either end of the montage, criticizes the Coors family for its support of right-wing causes, particularly the contras in Nicaragua. Again taking off on Coors' advertising which uses the slogan of "Silver Bullet" for its beer cans, the text

proclaims that Coors is "The Silver Bullet that aims The Far Right's political agenda at the heart of America."

On December 7, TDI sent the work on to Amtrak for approval. Ten days later, Anthony DeAngelo, the Amtrak Vice President for Real Estate and Operations Development, the person authorized by Amtrak's Board of Directors to oversee third-party advertising located on Amtrak property, disapproved Lebron's work on the grounds that it was "political." Amtrak notified TDI of this decision on December 23 in a letter stating that "Amtrak's policy is that it will not allow political advertising on the [S]pectacular advertising sign." Lebron learned of Amtrak's rejection from TDI on December 29, 1992, three days before his advertisement was to appear in the Spectacular.

Discussion

A. *Governmental Action*

Lebron contends that in rejecting his work Amtrak engaged in censorship in violation of his free speech rights under the First Amendment. Alternatively put, he contends that Amtrak's actions violated the requirements that the First Amendment imposes on governmental regulation of speech. The prohibitions of the First Amendment are "a restraint on government action, not that of private persons." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 114 (1973) (citing *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952)).

Amtrak claims it is a private entity, immune from the restrictions of the First Amendment and, to the contrary, guaranteed the right under the First Amendment to control speech on its billboards in whatever fashion it chooses. The first issue in contention thus turns on whether Amtrak should be deemed a governmental or a private actor for these purposes.

"Conduct that is formally 'private' may become . . . so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

Evans v. Newton, 382 U.S. 296, 299 (1966). The Supreme Court has outlined several ways through which the activities of a private entity can become governmental action. One such standard is relevant here.[2] Under this standard, known as the "symbiotic relationship" test, private activity becomes subject to the restrictions that the Constitution imposes on government when the government "has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961); *accord Evans v. Newton*, 382 U.S. at 299. There must be a " 'sufficiently close nexus between the State and the challenged action . . . so that the action of the [private actor] may be fairly treated as that of the State itself.' " *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). *See also Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54 (2d Cir. 1985) (same standards applied in assessing "federal action" as for "state action") (citing cases). The symbiotic relationship test "focuses on the [government's] overall relationship with the private actor," *Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1082 (2d Cir. 1990), and "does not require that the plaintiff demonstrate that the state was involved in the chal-

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[2] The other two standards are the "public function" doctrine, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978), and the "state compulsion" doctrine, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). The latter is applicable when the government "has exercised coercive power or has provided . . . significant encouragement, either overt or covert," to bring about the challenged action. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The former doctrine holds government action may be present "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'" *Blum*, 457 U.S. at 1005 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)); *see also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 (1978). It is not enough that the government has authorized a private entity to perform a task; it must be a role traditionally performed by the state. *See Flagg Bros.*, 436 U.S. at 160-62; *Jackson*, 419 U.S. at 352-53; *see also Marsh v. Alabama*, 326 U.S. 501 (1946) (company town with all the attributes of public town subject to constitutional limitations).

lenged conduct." *Stevens v. New York Racing Ass'n, Inc.*, 665 F. Supp. 164, 171 (E.D.N.Y. 1987).

The Supreme Court has consistently emphasized that the issue of state, or governmental, action turns on a factual inquiry specific to each situation. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. at 722 (private restaurant, operated in space leased from city owned parking garage, that refused service to blacks, deemed governmental actor where revenues from discriminatory service ultimately financed the public parking facility); *see Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 614 (1989) ("Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.' ") (citations omitted); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) (determination "necessarily fact-bound"); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (private remedial school held to be non-governmental, notwithstanding state regulation and funding, in a suit by discharged teachers).

I conclude, based on examination of the federal government's deep and controlling entwinement in Amtrak's structure and operations, that, when Amtrak undertakes to control the content of speech on its billboards, its conduct must be deemed governmental rather than private.

What is clear at a glance is that Amtrak does not comfortably fit the conventional mold of either private or governmental entity.

In form and name it resembles more closely a private entity. It is a for-profit business corporation and is decreed by act of Congress "not [to] be an agency, instrumentality, authority, or entity, or establishment of the United States Government." 45

U.S.C. § 541. Its common stock is owned by private railroad companies.

On the other hand, in both image and reality, it is impregnated with governmental character and inseparably intertwined with governmental authority and financing. Looking first at the symbolic, Congress established Amtrak, 45 U.S.C. § 501, and defined it as a "mixed-ownership government corporation." 31 U.S.C. § 9101. It is defined in the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, as a "public entity."[3] 42 U.S.C. § 12131(1)(C).

More significant is the governmental penetration of Amtrak's operations. All of Amtrak's directors are appointed directly or indirectly by the President of the United States. 45 U.S.C. § 543. Of its nine board members, five are directly appointed by the President;[4] the sixth is the Secretary of Transportation sitting ex officio, who is also appointed directly by the President. Two board members are selected by the United States Government, as the owner of all of Amtrak's preferred stock. The final member of the board is the president of Amtrak, who is selected by the other directors. The parties agree that Amtrak's board is responsible for controlling Amtrak and would have the authority to approve or disapprove of Amtrak's advertising policies throughout its facilities. Indeed, the board has, by resolution, authorized Amtrak's current agreements with TDI concerning advertising.

The federal government is also deeply involved in the financing of Amtrak's operations. Every year, Congress appropriates the sum necessary to cover the shortfall of

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[3] Amtrak is also subject to the Freedom of Information Act. 45 U.S.C. § 546(g).

[4] One is selected from a list supplied by the Railway Labor Executives Association, one from among the governors of states with an interest in rail transportation, and one as a representative of business with an interest in rail transportation. 45 U.S.C. § 543(a)(1)(C). Two directors are selected from lists of names supplied by commuter authorities that work with Amtrak. § 543(a)(1)(D)(ii).

Amtrak's operating results. *See* 45 U.S.C. § 601.[5] For example, for the fiscal year ending September 30, 1993, Congress has appropriated up to $846 million for Amtrak's operating losses, capital improvements, tax liability, and labor protection costs and for the Northeast Corridor Improvement Program. Pub. L. 102-388, 106 Stat. 1520 (Oct. 6, 1992). For this reason, Amtrak's revenues from the leasing of its billboard space are, in a sense, revenue of the federal government. Every dollar of net billboard revenue realized by Amtrak results in a one dollar reduction of the subsidy obligation of the federal government. Conversely, if Amtrak subsidized any exhibitor on its billboards by charging less than the market rate, the display would essentially be financed by the federal government.[6]

Amtrak has also been vested with various attributes of governmental character. For example, Congress has given Amtrak the power of eminent domain, 45 U.S.C. § 545(d), exemption from state and local taxes and fees, including all real estate taxes, 45 U.S.C. § 546(b), and various loan guarantees, 45 U.S.C. § 602, so that it borrows under the credit of the federal

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[5] In fact, as the parties have agreed, in 1976, Amtrak's fiscal year end for accounting purposes was changed from December 31 to September 30 "to coincide with the fiscal year adopted by the federal government and used in providing federal assistance to [Amtrak]."

Congress stated as a goal that Amtrak use its "best business judgment in taking actions to minimize Federal subsidies." 45 U.S.C. § 501a(1), and Congress encouraged Amtrak to "enter into agreements with the private sector and undertake initiatives which are consistent with good business judgment and designed to maximize its revenues and minimize Federal subsidies." 45 U.S.C. § 501a(14).

[6] *See Burton*, 365 U.S. at 724 (discriminatory practices of restaurant allegedly increased business and therefore benefitted the restaurant's landlord, the government, supporting finding of state action); *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65, 73 (D. Mass. 1990) (state action finding supported by fact that success of private entity served financial interests of city in reviving urban area); *Stevens v. New York Racing Ass'n. Inc.*, 665 F. Supp. at 172-75 (likelihood of state action where excess revenues of the non-profit association went to the state).

government. Amtrak is required to report annually to Congress on its operations. 45 U.S.C. § 548.

Finally, the federal government has invested billions of dollars in Amtrak's properties. Amtrak acquired its Northeast Corridor properties, including Penn Station, by statutory condemnation paid for by the United States.[7] *See* Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 *et seq*. The federal government has also invested billions of dollars in the improvement of Amtrak's Northeast Corridor facilities. *See* 45 U.S.C. § 854 (authorizing up to $2.5 billion). While Amtrak owns the fee in Penn Station, the federal government holds a mortgage on it, and indeed on all the Northeast Corridor properties.[8]

Thus, when Amtrak undertakes to control the content of the messages on its billboards in Penn Station, these controls are exercised by a corporation whose directors are appointed by the President, whose operations are financed by the federal

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[7] After much litigation and negotiation, the federal government, in 1981, paid Penn Central $2.113 billion as compensation for the Northeast Corridor properties, including Penn Station.

[8] In addition, portions of Penn Station are used by other governmental entities under leases with Amtrak. For example, Amtrak leases significant portions of Penn Station to the Long Island Rail Road (LIRR) and New Jersey Transit (NJT), both public entities, for the operation of their respective rail passenger services. An array of leases and joint agreements among Amtrak, LIRR, and NJT govern the management of public areas of Penn Station and the funding of construction and maintenance of various train and tunnel facilities. Hence, portions of the station occupied by LIRR and NJT are subject to constitutional limitations, and these areas are largely contiguous with those controlled by Amtrak. Indeed, some facilities of LIRR and NJT, such as ticket and information booths, are in the midst of Amtrak's facilities on the same floor of Penn Station as the Spectacular. Notably, the public therefore has little way of knowing whether or not it is in an area where constitutional limitations apply. *See Coleman v. Wagner College*, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring) (suggesting that one rationale for holding of *Burton* is that when "citizens may reasonably believe [action] to have been taken at the state's instance, state action may legitimately be found even though the state left the private actors almost complete freedom of choice").

government, and whose properties, in major part, are mortgaged to the federal government.

Amtrak contends that it cannot be deemed a governmental actor. It first cites a range of cases which found in various contexts that Amtrak is not a government agency or entity. *See, e.g., National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry. Co.*, 470 U.S. 451, 454 (1985); *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987); *Ehm v. National R.R. Passenger Corp.*, 732 F.2d 1250, 1253-56 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984); *Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169, 173 (M.D. Ala. 1982); *Sentner v. Amtrak*, 540 F. Supp. 557 (D.N.J. 1982). These cases do not determine the question in this case. Plaintiff does not contend that Amtrak is a governmental agency. What plaintiff contends is that the federal government is sufficiently entwined in Amtrak's operations and authority that the particular actions at issue must be deemed governmental action.

Next Amtrak relies on a number of cases in which discharged employees charged either Amtrak or the similarly structured Consolidated Rail Corporation ("Conrail") with unconstitutional governmental action. In each of these cases, the courts held that Amtrak's (or Conrail's) actions in dealing with its employees were not deemed to be governmental action. *See, e.g., Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985) (constitutional limitations do not apply to the activities of Conrail in discharging an individual employee); *Anderson v. National R.R. Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984) (in challenge to employee termination, Amtrak not a state actor); *Andrews v. Consolidated Rail Corp.*, 831 F.2d 678 (7th Cir. 1987) (Conrail not state actor in refusing to reinstate employee); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720 (7th Cir. 1987) (no state action in discharging employee); *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725 (N.D. Ill. 1984) (no state action in wrongful discharge suit); *Rost v. National R.R.*

Passenger Corp., 1989 WL 104809 (E.D. Pa. Sept. 11, 1989) ("no allegations concerning the nexus between the federal government and Amtrak's personnel practices."); *Hankin v. National R.R. Passenger Corp.*, 1987 U.S. Dist. LEXIS 10741 (N.D. Ill. Nov. 16, 1987) (following *Anderson*); *cf. Railway Labor Executives Ass'n v. National R.R. Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988) (drug testing by Amtrak not Fourth Amendment violation). Amtrak argues that these authorities conclusively determine for the present litigation that it is not a governmental actor.

The argument is unpersuasive. The fact that Amtrak is considered a private employer in administering its employment of personnel does not mean it will be deemed private when it regulates speech. Whether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue.[9] As Judge Friendly explained in *Wahba v. New York University*, 492 F.2d 96, 100 (2d Cir. 1974), "we do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims concerning different forms of government involvement and other constitutional guarantees." *See also Weise v. Syracuse University*, 522 F.2d 397, 404 (2d Cir. 1975). Indeed Amtrak conceded at oral argument that, if it restricted service to passengers on the basis of race, religion, or national origin, it would be deemed a governmental actor in that respect. *See Burton v. Wilmington Parking Authority, supra.*

In my view, the regulation of public speech through the use of the billboards in public train stations raises very different considerations from Amtrak's administration of its work force.

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[9] Indeed, several courts have concluded that Amtrak can be a state actor in the context of false arrest claims brought against Amtrak security officers. *See, e.g., Merola v. National R.R. Passenger Corp.*, 683 F. Supp. 935, 940-41 (S.D.N.Y. 1988); *Sisak v. National Railroad Passenger Corp.*, 1992 WL 42245 (S.D.N.Y. February 24, 1992).

In actions based on an employer's dealings with employees, no particularly great significance attaches to whether the employer's actions are deemed to be private or governmental. There are no important policies of the Constitution that would be undermined by permitting an employer that is entwined with government to deal with employees under the rules that govern private employers. On the other hand, where the conduct in question is the regulation of speech, enormous differences follow from whether the actor is deemed to act as government or as a private individual. And to allow an entity controlled by and intertwined with the government to regulate, control, or censor speech in the manner that is permitted for a private actor risks to do enormous damage to one of the most important principles of the Bill of Rights.

If Amtrak is deemed a private actor for this purpose, it would enjoy the full range of the private citizen's rights of free speech under the First Amendment. It would be free to exercise discriminatory control over the messages transmitted by its billboards. For example, as the Presidential election approached, Amtrak would have the absolute right to devote all of its billboards to champion the reelection of the incumbent president and warn of danger to the republic if the challenger should be elected. Amtrak would enjoy this right, just like the owner of a private bar or bowling alley who has the undeniable right to cover the walls, if he chooses, with posters advocating the reelection of the president. Similarly, Amtrak would be free to sponsor advertisements on its billboards either opposing abortion or favoring choice; it could likewise advocate adherence to Catholicism and deprecate Protestantism, or vice versa, as it chose.

If, on the other hand, Amtrak's billboard regulation is deemed governmental, Amtrak would be barred from favoring a political candidate, from favoring messages of any chosen viewpoint, from sponsoring messages that established religion, from exercising arbitrary discrimination in allowing access to its billboards, and from regulating the speech of its

billboard tenants in any way, except within narrow parameters.

Among the most powerful principles asserted by our Constitution are those found in the First Amendment designed to prevent Government from exercising discretionary control over the content of the speech of private persons and entities. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (citations omitted), for "the Government's ability to impose content-based burdens on speech raises the spector that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S.Ct. 501, 508 (1991) (citation omitted).

Given the force of this principle, it is inconceivable that Amtrak, whose directors are appointed by the President, whose operations are financed by the Government, and which is subject to Governmental control and intertwinement in all the respects outlined above, would be free under the First Amendment to donate its billboards to the support of the incumbent President's reelection campaign. But that is the inevitable consequence if Amtrak is correct in its contention that it is engaged in private action when it controls the content of ads on its billboards.

One might argue that the conclusion should be otherwise when control is exercised not by the Presidentially-appointed directors, but by a lower level employee. But the argument is not persuasive. Regardless to what degree the board of directors exercises its control, it has the power to control the actions of the corporation it governs. Furthermore, the controls here at issue were exercised by a high officer, the director of Amtrak's real estate operations, to whom the Amtrak board had directly delegated such authority.[10]

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[10] Indeed, the minutes of meetings of Amtrak's board of directors show that the board has, on at least one occasion, authorized an individual lease for the Spectacular.

I conclude that, notwithstanding Amtrak's private character in its employment contracts, it must be deemed to engage in governmental action when it undertakes to regulate the content of the advertisements on its billboards.

B. *The Requirements of the First Amendment*

I now turn to the question whether Amtrak's actions comport with the requirements that the First Amendment places on such governmental conduct.

Along with other constraints, the First Amendment requires that, when the government regulates speech, it must do so by a policy that is (i) clearly set forth, (ii) not so vague as to be subject to abuse, (iii) consistently applied and (iv) not based on viewpoint. These rules are intended to avoid the risk that government may impose arbitrary, discriminatory, or preferential controls on speech. *See generally City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-764 (1988) (invalidating ordinance giving town mayor complete discretion in licensing sidewalk newsracks). Without explicit standards, clearly disclosed government regulation of speech may be applied in an arbitrary and discriminatory manner. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286-87 (1961) (terms of regulation must be "susceptible of objective measurement"). The Supreme Court has cautioned that a scheme for regulating speech "that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.' " *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 605 (1990) (quoting *Lakewood*, 486 U.S. at 757). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). In addition, a government restriction may not discriminate against speech on the basis of the viewpoint of the speaker. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (regulation of public forum must be content-neutral; regulation of non-public forum must

be viewpoint-neutral); *see also United States v. Kokinda*, 110 S. Ct. 3115, 3121 (1990); *Longo v. United States Postal Service*, 953 F.2d 790, 796 (2d Cir.) ("[r]estrictions on expression because of disagreement with message or idea being conveyed by the speaker" violate First Amendment), *vacated and remanded on other grounds*, 113 S. Ct. 31 (1992), *reinstated*, ___ F.2d ___, 1992 WL 383112 (2d Cir., Dec. 28, 1992); *see generally International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 1701 (1992).

I find that Amtrak's policy violates the first three (and possibly also the fourth) of these requirements.

(i) *Not clearly set forth.* The Amtrak policy identified by Mr. DeAngelo as the reason for the rejection is its prohibition of "political" advertisements in Penn Station. Nowhere is this policy committed to writing. Nor was the existence of the policy disseminated. Thus TDI, which leased out nearly all the billboards in Penn Station without consulting Amtrak, was unaware of the policy's existence. An unwritten censorship policy is susceptible to inconsistent application that threatens free speech. *See Lakewood*, 486 U.S. at 757; *see also Abel v. Town of Orangetown*, 759 F. Supp. 161, 164-65 (S.D.N.Y. 1991) (invalidating zoning ordinance allowing town board unfettered discretion in granting consent to place sign on town property); *New Alliance Party v. Dinkins*, 743 F. Supp. 1055, 1064-65 (S.D.N.Y. 1990) (special events permitting system of parks violated First Amendment where permits granted or refused without any regulatory guidelines).

In attempting to identify a writing that contains its policy, Amtrak points to two earlier advertising licensing agreements between Amtrak (or its predecessor, the Pennsylvania Railroad Company) and TDI. These agreements, dated 1967 and 1980, governed TDI's leasing of the Spectacular. Both agreements contained a provision stating that Amtrak could refuse any advertising that Amtrak, "in its judgment," may deem "unlawful, immoral, improper or offensive to good taste . . . or involve political or other views which could result in

dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public . . . ."

However, neither of these licensing agreements is still in effect. The 1980 agreement, which superseded the 1967 agreement, was itself superseded by another agreement in 1985 covering all Amtrak billboards in Penn Station. The 1985 agreement and its successor, the 1991 agreement, do not include any provision comparable to the one in the 1967 and 1980 agreements. They do state that, "All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion." This broad provision clearly does not state, or even imply, the rejection of all "political" advertising.

Moreover, the evidence makes clear that Amtrak's supposed policy rejecting "political" advertising was not even known to many of those responsible for billboard advertising. William P. Delaney, a project manager in Amtrak's Real Estate Department who is responsible for supervising Amtrak's arrangements with TDI for advertising in Amtrak's facilities, knew of no prohibition on "political" advertising applicable to any of Amtrak's facilities. None of the executives at TDI, who had been leasing Penn Station billboard space for years and who had authority to approve advertising copy for all areas other than the Spectacular, knew of Amtrak's policy barring "political" advertisements.

(ii) *Vague*. Even if Amtrak's policy, as expressed by Mr. DeAngelo, were in writing, or otherwise clearly set forth, such a policy would still be constitutionally infirm, for the term "political" is of such unclear meaning that it is easily susceptible to arbitrary or discriminatory censorship by those administering the policy. *See Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 513-14 (9th Cir. 1988) (invalidating as vague regulations that barred issuing educational certificates to documentary films that attempted "to influence opinion, conviction or policy (religious, economic, or political propaganda), to espouse a cause, or conversely, when they seem to attack a particular persuasion" and that "appear to have as their purpose or effect to attach or discredit economic, religious, or political views or practices"); *see also Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) ("conduct . . . annoying to persons passing by" unconstitutionally vague); *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278, 293-96 (S.D.N.Y. 1992) ("offensive to a majority of adults" unconstitutionally vague).

The policy might be thought, for example, to bar only advertisements relative to candidates for political office. It might be thought to encompass public service messages on public issues, including drunk driving, safe sex, abortion counselling, and religious messages. It might also cover commercial advertising that included public service messages like "Keep America Beautiful," or that discussed controversial issues.

Amtrak's executives were themselves at odds over the meaning of Amtrak's policy. Mr. DeAngelo at times indicated that the policy prohibited only those advertisements that were both "political" *and* divisive or objectionable; at other times, he stated that the policy prohibited all advertisements that were not devoted to the selling of a product or service. Bruce M. Bourque, Amtrak's Project Director for Real Estate Development for Penn Station, who first reviews advertising material submitted for the Spectacular, knew that there was a policy barring "political" advertisements, but he could not really say what such a policy meant. *See U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 769 (D.C. Cir. 1983) ("the hazy line between ideological and commercial speech is reflected in the record of this case").

This is not to say that reasonable individuals could never agree that a particular advertisement was or was not "political." As the court explained in *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d at 769,

> The point is not that the distinction between commercial and political speech is entirely unworkable—there is little doubt that it can operate successfully at the extremes to screen out patently political from wholly commercial advertisements. Rather, the point is that there is a gray area near the middle in which this particular subject matter restriction tends to operate as a *sub rosa* penalty on presenting political viewpoints in "controversial," as opposed to more benign "commercial," forms.

This again reflects the manner in which Amtrak's policy is susceptible to abuse, for "[a]pplying this guideline involves an exercise of discretion and subjective judgment on the part of [Amtrak] officials." *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 899 (D.C. Cir. 1984). In such circumstances, the threat is great that "the policy operates in part to screen out only controversial, but not non-controversial, political messages." *U.S. Southwest Africa/Namibia Trade & Cultural Council*, 708 F.2d at 769.

Amtrak contends that the term "political" as employed in its policy means to include (and therefore prohibit) all advertisements that do not seek to sell a product or service. However, that is certainly not what the term "political" is generally understood to mean, and, as noted, this is not how the relevant personnel understand the policy. When a standard for governmental control of speech is so unclear, there is a high likelihood of inconsistent and discriminatory application. Such a vague policy provides Amtrak officials with precisely the kind of unfettered discretion to control speech that the Supreme Court has held to contravene the First Amendment. *See, e.g., FW/PBS, Inc.*, 110 S. Ct. at 605; *Lakewood*, 486 U.S. at 757; *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); *Saia v. New York*, 334 U.S. 558, 560 (1948) ("There are no standards prescribed for the exercise of [the official's] discretion."); *see generally Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) ("It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms with the Constitution guarantees contingent upon the uncontrolled will of an official—

as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.").

(iii) *Not consistently applied.* A further infirmity in Amtrak's "no political advertisements" policy is that it is not consistently applied. As noted above, the policy is unknown to Amtrak's leasing agent, with the result that billboard space in Penn Station has repeatedly been leased for advertisements that are "political" in the sense of Amtrak's definition. Indeed, the licensing agreement between Amtrak and TDI expressly allows for public service advertisements (at reduced rates or no charge). And TDI maintains written *Guidelines For Public Service Advertising*. They provide that such advertising will be displayed (at less than full rate) for no more than a thirty-day period, only when space is available and may be pre-empted by any commercial (*i.e.*, full rate) advertising. The guidelines are designed to insure that such non-commercial advertisements shall be accepted only from "recognized, legitimate [tax exempt] not-for-profit organizations, corporations, National, State or Local government agencies and subdivisions, philanthropic or cultural organizations whose activities would be of interest or benefit to a majority of the area population," and that the advertisements adhere to "good taste, decency and community standards." It is clear that all of the advertisements covered by the Guidelines for Public Service Advertising are of the type that Amtrak contends are prohibited by its rule.

Furthermore, TDI's leasing guidelines do recognize a distinction affecting advertisements that are "political." The TDI guideline, however, does not reject them, but rather considers them commercial and therefore subject to full rate charge.[11]

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[11] Particularly baffling in the context of this case is the TDI guideline that states:

> Because of the separation of Church and State dictates of our Constitution, organizations that are primarily religious in structure *do not* qualify for Public Service space.

(Emphasis in original).

It is clear beyond dispute that Amtrak's policy is not being consistently followed. TDI's records show that it leases space to advertisers that are not "commercial," and some of which are arguably "political." These include the New York Department of the Environment, the New York Department of Commerce, a foundation for muscular dystrophy, and *Plain Truth* magazine, a free magazine on political and social issues published by The Worldwide Church of God. In addition, testimony of the general counsel of TDI indicates that TDI regularly displays public service advertisements, including subjects such as the homeless, the environment, drunk driving, AIDS awareness, health issues, and race relations.

(iv) *Void for viewpoint bias.* Furthermore, depending on which of the many proffered versions really is Amtrak's policy, the policy may also be void because of discrimination based on viewpoint. *See Perry Educ. Ass'n*, 460 U.S. at 45-46.

If, for example, Amtrak's policy, as Mr. DeAngelo sometimes testified, is directed against divisive, controversial, or objectionable matter, or if, as set forth in the 1967 and 1980 agreements with TDI, it gives Amtrak discretion to refuse any advertising involving "views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public . . . ," it would be void; government may not regulate speech by such criteria. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "[T]he use of the controversial nature of speech as the effective touchstone for regulation 'threatens a value at the very core of the First Amendment, the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." ' " *U.S. Southwest Africa/Namibia Trade & Cultural Council*, 708 F.2d at 769 (quoting *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 548 n.9 (1980) (Stevens, J., concurring) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964))). An advertisement such as Lebron's

> cannot be prohibited . . . merely because it provokes disagreements and offends the sensibilities of the majority. "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." It is precisely this speech for which the protection of the First Amendment was intended.

Penthouse International, Ltd. v. Koch, 599 F. Supp. 1338, 1350 (S.D.N.Y. 1984) (citation omitted); *see also Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("A function of free speech under our system of government is to invite dispute."); *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) ("not free thought for those who agree with us but freedom for the thought that we hate").

If the policy is as set forth in TDI's guidelines, whether for Public Service Advertising or for Commercial Advertising, it is void for the same reason, for these guidelines are designed to ensure against advertising that is controversial, in bad taste, or inconsistent with the taste and preferences of the majority of the community. Such standards are of course permissible for a private actor, but not for a governmental actor or an actor whose symbiotic relationship with government renders the act of regulation governmental. Because Amtrak is saturated with the presence of the federal government, it may not regulate speech in an effort to shield its customers from the abrasive, the obnoxious, the controversial.

Conclusion

Plaintiff Lebron has convincingly demonstrated that in rejecting his contract to display his art on its billboard Amtrak was engaged in governmental action and that the standards employed by Amtrak in rejecting his work violated its obligations under the First Amendment.[12]

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[12] I do not reach Lebron's alternative contract theory because this resolution makes it superfluous.

Defendants are accordingly directed to give plaintiff immediate access to the Spectacular in accordance with his contract.

Dated: New York, N.Y.
February 5, 1993

SO ORDERED:

Pierre N. Leval, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 93-7127

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of December, one thousand nine hundred and ninety-three.

PRESENT: HON. J. EDWARD LUMBARD,
HON. JON O. NEWMAN,*
HON. J. DANIEL MAHONEY,

Circuit Judges.

MICHAEL A. LEBRON,

Plaintiff-Counter-Defendant-Appellee,

—against—

NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK),

Defendant-Appellant,

TRANSPORTATION DISPLAYS, INCORPORATED,

Defendant-Counter-Claimant.

[Filed Dec. 27, 1993]

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* Judge Newman became Chief Judge of the Second Circuit Court of Appeals on July 1, 1993.

ORDER

Appeal from the United States District for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court. Lebron's motion to strike pages from the joint appendix and for double costs and attorney's fees is denied; his motion to file a supplemental volume of exhibits is granted.

GEORGE LANGE III, Clerk
By:

Edward J. Guardaro
Staff Attorney